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No. 07-562

IN THE
Supreme Court of the United States

ALTRIA GROUP, INC. AND PHILIP MORRIS USA INC.,
Petitioners,

v.

STEPHANIE GOOD, LORI A. SPELLMAN,
AND ALLAIN L. THIBODEAU,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the First Circuit

BRIEF OF FORMER COMMISSIONERS OF THE FEDERAL TRADE COMMISSION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are former Commissioners of the Federal Trade Commission. Michael Pertschuk was a Commissioner from 1977 to 1984, serving as Chairman of the Commission from 1977 to 1981. Commissioner Pertschuk served as consumer counsel and later chief counsel and staff director to the U.S. Senate Committee on Commerce, Science and Transportation, from 1965 to 1976, where he was instrumental in drafting the Federal Cigarette Labeling and Advertising Act, landmark legislation that required warnings on cigarette labels. Patricia P. Bailey served as a Commissioner from 1979 to 1988. Commissioners Bailey and Pertschuk both served during the investigation and prosecution of the Barclay cigarette case (discussed below) and were signatories to the FTC's Policy Statement on Unfairness in 1980. Christine A. Varney was a Commissioner from 1994 to 1997. She served during the Carlton cigarette investigation and prosecution (discussed below), as well as the FTC's investigation of R.J. Reynolds Tobacco Company's Joe Camel ad campaign. Sheila F. Anthony served as a Commissioner from 1997 to 2003, when the Commission opened its still-ongoing investigation into discontinuing or changing the FTC protocol for measuring tar and nicotine delivery of cigarettes.

As former Commissioners of the Federal Trade Commission, *amici* have practical agency experience and a thorough working knowledge of federal and

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[1] No counsel for a party authored any part of this brief. No person or other entity other than *amici curiae* contributed monetarily to the preparation and submission of this brief. Letters of consent from all parties to the filing of this brief have been filed with the Clerk of this Court.

state unfair trade regulation, both in a general sense and specifically with regard to the Commission's regulation of cigarette advertising. *Amici* submit this brief to assist the Court in understanding the FTC's historical status as a relatively small agency faced with the substantial task of policing unfair trade practices of almost all industries throughout the country, a job which the agency cannot accomplish without partners—both public and private, state and federal. *Amici* are likewise well-versed in the Commission's enforcement activities, such as the use of consent orders, which generally prohibit conduct by certain parties, not authorize or immunize that conduct on an industry-wide basis. Although the FTC Act prohibits deceptive cigarette advertising, the Commission has never defined, authorized, or encouraged cigarette companies' use of descriptors such as "lights" or "low tar."

SUMMARY OF ARGUMENT

Petitioners' argument that the Federal Trade Commission has impliedly preempted state consumer protection laws, insofar as they would be applied to cigarette manufacturers' deceptive claims about their cigarettes, rests primarily on the Commission's history of prosecuting deceptive cigarette advertising claims dating to the 1940's, the so-called FTC Method for measuring tar and nicotine delivery of cigarettes, and on a handful of consent orders the Commission has entered into with tobacco companies. Notably, however, throughout that 60-plus year history, the FTC has never remotely hinted that it has preempted state consumer protection laws prohibiting deceptive or misleading claims, even as applied to cigarette advertising. Indeed, Petitioners ignore the fact that it was the FTC which actively campaigned for States to adopt little FTC acts of their own and co-authored one of the uniform acts—at precisely the same time the Commission was supposedly "impliedly" preempting state consumer law as applied to cigarette advertising. Petitioners' claims are not grounded in FTC history.

Similarly, Petitioners' claims are not consistent with the realities of the tasks confronting the Commission. The consumer protection wing of the FTC, tasked with combating consumer fraud throughout the nation, consists of only a few hundred employees. That is just one of the many reasons the FTC proactively seeks to partner with the States; its consumer mission is too big for any one agency, particularly a relatively small one like the FTC.

Finally, Petitioners ask the Court to make the FTC's consent orders in isolated cases do the preemptive work of trade regulation rules without re-

gard for any of the safeguards Congress went out of its way to incorporate into the FTC scheme when it granted the Commission rulemaking authority in 1975. Not only would that result fly in the face of clear Congressional intent, it would also interfere significantly with the Commission's use of the consent settlement process, as discussed below.

Permitting state law claims like Respondents' to proceed will further FTC objectives, not frustrate them. Cigarette companies have no immunity from generally applicable anti-fraud laws like Maine's, and there is no sound reason claims of deception should not be actionable under state law. The judgment below should accordingly be affirmed.

ARGUMENT

The First Circuit held that the FTC's oversight of tar and nicotine claims in cigarette advertising does not "authorize" or impliedly preempt Respondents' claims that Petitioners' use of the cigarette descriptors "lights" and "lowered tar" are deceptive and misleading under Maine's Unfair Trade Practices Act. That holding is sound. The FTC has had very little to say about such descriptors, it has never officially defined them, and it has never granted the cigarette industry wholesale immunity for their use. The FTC has never pursued any policy that would be frustrated by a state law ban on the use of such misleading and deceptive terms. The First Circuit's judgment should be affirmed.

I. ENFORCEMENT OF STATE CONSUMER PROTECTION STATUTES COMPLEMENTS THE COMMISSION'S REGULATORY GOALS.

Petitioners acknowledge that, in enacting the Labeling Act, "Congress had no intention of insulating tobacco companies from liability for inaccurate statements about the relationship between smoking and health." Petitioners' Br. at 28. But Petitioners contend that Congress intended to give the FTC exclusive authority to police deceptive advertising by cigarette companies. *Id.* That is a fundamental misunderstanding of the history, functions, and resources of the FTC.

The Federal Trade Commission is a small agency, consisting predominately of lawyers and economists. It is headed by five Commissioners, nominated by the President and confirmed by the Senate. As currently configured, the Commission is divided into three bureaus: the Bureau of Consumer Protection, the Bureau of Competition (the Commission's anti-

trust arm), and the Bureau of Economics which provides economic analysis and support to the other two bureaus. FTC website (*available at* http://ftc.gov/bcp/edu/pubs/consumer/general/gen03.shtm#be).

The Commission is responsible for enforcement of more than 30 statutes, including federal antitrust laws. *See* 16 C.F.R. § 0.4; FTC website, http://www.ftc.gov/ogc/stats.shtm ("The Commission has enforcement and administrative responsibilities under 46 laws."). The breadth of the FTC's statutory and regulatory responsibilities is substantial. As former Commissioner Thomas Leary explained:

> The first thing we have to recognize is that the FTC can not cover the waterfront. It is a relatively small agency. There are about a thousand people working at the FTC, roughly divided between our competition mission and consumer protection mission, which includes advertising. I think there are approximately 550 people on the consumer protection side.

Remarks delivered on January 16, 2003, at the Conference on Dietary Supplements of the Food and Drug Law Institute (*available at* http://abacus-ms.com/speeches/leary/fdli.pdf). That is an incredibly small force for combating virtually all unfair trade practices affecting commerce in the U.S.

When Congress passed the Labeling Act in 1965, the Commission had a slightly larger staff than it currently has,[2] but even at that time, "the Commis-

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[2] *Compare* Federal Trade Commission, *1965 Annual Report to Congress* at 2 (*available at* http://ftc.gov/os/annualreports/ar1965.pdf) (1,175 employees), *and* Federal Trade Commission, *Performance and Accountability Report Fiscal Year 2007* at 5 (*available at* http://www.ftc.gov/opp/gpra/2007parreport.pdf) (1,100 employees).

sion's limited staff to cope with the volume of deceptive practice work confronting it[] require[d] careful planning so that sufficient effort w[ould] be expended on those matters reflecting the highest degree of public interest." Federal Trade Commission, *1966 Annual Report to Congress* at 17 (*available at* http://ftc.gov/os/annualreports/ar1966.pdf) (hereinafter cited as "*1966 FTC Report*"). Since then, the Commission's enforcement responsibilities have expanded considerably, and so have the opportunities for and occurrences of unfair, deceptive trade practices, especially with the advent of the Internet age.

Due to such scarce resources and the enormity of its assignment, the Commission has long encouraged and relied on a dual enforcement scheme with States enforcing their own consumer protection laws. In 1964, the Commission began urging States to adopt consumer protection legislation. Sheila B. Scheuerman, *The Consumer Fraud Class Action: Reining In Abuse By Requiring Plaintiffs To Allege Reliance As An Essential Element*, 43 Harv. J. on Legis. 1, 15 (2006). That same year, the National Conference of Commissioners on Uniform State Laws proposed the Uniform Deceptive Trade Practices Act ("UDTPA"). The UDTPA was intended "to bring state [consumer protection] law up to date by removing undue restrictions on the common-law action for deceptive trade practices." *Id.* at 15 n.103 (quoting *Handbook of the National Conference of Commissioners on Uniform State Laws and Proceedings of the Annual Conference Meeting in Its Seventy-Fifth Year* 253-64 (1964)).

In 1970, the FTC and the Committee on Suggested State Legislation of the Council of State Governments issued another model statute, the Unfair Trade Practices and Consumer Protection Law,

which provided for private actions and class actions. Scheuerman, *supra*, at 16-17. "[B]y the early 1970s, nearly every State had enacted a statute designed to prevent consumer fraud." *Id.* at 18. "Indeed, many States adopted provisions at the Commission's urging that direct the state courts to the Commission's decisions and policies for guidance or exempt from state regulation practices found unlawful under the FTC Act. This has resulted in the integration of Commission precedent with state law." Patricia P. Bailey & Michael Pertschuk, *The Law Of Deception: The Past As Prologue*, 33 Am. U. L. Rev. 849, 862-63 (1984).

The D.C. Circuit has also noted the FTC's "policy of cooperation with state law enforcement agencies." *Fleming v. FTC*, 670 F.2d 311, 313 (D.C. Cir. 1982). "[T]he FTC Act has long enjoyed a cooperative relationship with state laws. The FTC itself has encouraged state deceptive practice laws because problems in the marketplace go beyond the enforcement capabilities of the federal government." *Kellogg Co. v. Mattox,* 763 F. Supp. 1369, 1380 (N.D. Tex. 1991). The "Commission, through its division of Federal-State and Consumer Relations, works closely with state and local agencies, including state attorneys general, to coordinate enforcement." Stephanie W. Kanwit, 2 *Fed. Trade Comm'n* § 26.3 (2007).

Congress itself has recognized the importance of cooperation between the States and the FTC. *See* Federal Trade Commission Act Amendments of 1994, Pub. L. No. 103-312, § 13, 108 Stat. 1691, 1696-97 ("The [FTC] shall review its statutory responsibilities to identify those matters within its jurisdiction where Federal enforcement is particularly necessary or desirable and those areas that might more effec-

tively be enforced at the State or local level."). For these reasons, Petitioners' contention that the FTC has sole "responsibility" to police deceptive advertising by cigarette companies cannot be squared with the historical operation of the FTC.

Furthermore, with respect to Petitioners' implied preemption argument, it would be anomalous, to say the least, if after urging States to enact and enforce their own consumer protection laws, the Commission displaced those very same laws *sub silentio* through consent orders, as Petitioners maintain. The preemptive effect Petitioners attribute to such enforcement actions—particularly consent orders—reflects a fundamental misunderstanding of the dual nature of the state and federal enforcement scheme the Commission has uncompromisingly fostered. It also evinces confusion about the nature of the Commission's enforcement tools, as discussed below.

II. ALTHOUGH THE COMMISSION HAS ENTERED INTO CONSENT ORDERS WITH TOBACCO COMPANIES, THE COMMISSION NEVER AUTHORIZED PETITIONERS' USE OF LIGHTS AND LOW TAR DESCRIPTORS.

Petitioners assert that through "a series of consent agreements with tobacco companies, the FTC also authorized the use of tar and nicotine descriptors in cigarette advertising." Petitioners' Br. at 47. That contention does not square with those consent orders or with the way the FTC functions.

The FTC is a civil "law enforcement" agency with investigative, prosecutorial and adjudicative powers. Stephanie W. Kanwit, 2 *Fed. Trade Comm'n* § 28:1 (2007). "The heart of the FTC's authority is Section 5 of the FTC Act, which prohibits unfair methods of

competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce." Justin Dingfelder & Sandra Brickels, *To Protect Consumers, The FTC Means Business*, 45-JAN Fed. Law. 24 (1998). That was not always the case, however.

When Congress first created the FTC with its passage of the Federal Trade Commission Act in 1914, it did not vest the Commission with the broad power to combat unfair trade practices it enjoys today. Rather, "[s]ection 5 of the Trade Commission Act [was] supplementary to the Sherman Anti-Trust Act and the Clayton Act," and "[t]he paramount aim of the act [was] the protection of the public from the evils likely to result from the destruction of competition or the restriction of it in a substantial degree." *FTC v. Raladam Co.*, 283 U.S. 643, 648 (1931). In 1938 Congress expanded the Commission's authority with the passage of the Wheeler-Lea Act, Pub. L. No. 75-447, 52 Stat. 1028, amending the FTC Act to encompass "unfair or deceptive acts or practices" as well as "unfair methods of competition."

The 1938 amendments did not, on the other hand, significantly alter the Commission's arsenal for combating unfair trade practices. That arsenal included tools designed to secure voluntary compliance with the law, such as "advisory opinions" which did not have the force of law. Note, "*Corrective Advertising" Orders Of The Federal Trade Commission*, 85 Harv. L. Rev. 477, 482 n.33 (1971) (hereinafter cited as "'*Corrective Advertising' Orders*").

In addition, "since 1955, the FTC has created Trade Practice Guides pursuant to Trade Practice Conferences in order to establish nonviolative practices in many types of industry." W.H. Ramsay Lewis, *Infomercials, Deceptive Advertising And The*

Federal Trade Commission, 19 Fordham Urb. L.J. 853, 855-56 (1992). Industry guides do not have the force of law. 16 C.F.R. § 1.5 ("Industry guides are administrative interpretations of laws administered by the Commission for the guidance of the public in conducting its affairs in conformity with legal requirements. ... Failure to comply with the guides may result in corrective action by the Commission under applicable statutory provisions.").

Although the Commission also issued rules, it was widely believed that such rules did "not have the force of law." *Corrective Advertising' Orders*, *supra*, at 482 n.33. They were thought "to provide definitive guidance and information for businessmen as to what the Commission believes is required by the laws the Commission enforces. The FTC ha[d] no specific statutory authority for issuance of the rules." Note, *Trade Rules And Trade Conferences: The FTC And Business Attack Deceptive Practices, Unfair Competition, And Antitrust Violations*, 62 Yale L.J. 912, 917-18 (1953) (hereinafter cited as "*Trade Rules*"). Indeed, even "the FTC, for approximately 50 years from the passage of the FTCA, never asserted the [rulemaking] authority." *National Petroleum Refiners Ass'n v. FTC*, 340 F. Supp. 1343, 1347 (D.D.C. 1972), *rev'd*, 482 F.2d 672 (D.C. Cir. 1973). Thus, the Commission's later "exercise of what had been a dormant rulemaking power (other than to make rules of procedure) proved to be extremely controversial." *United Air Lines, Inc. v. C.A.B.*, 766 F.2d 1107, 1112 (7th Cir. 1985).

Given the "the Commission's limited staff to cope with the volume of deceptive practice work confront-

ing it,"[3] given the FTC's encouragement of States to enact broad consumer fraud protections, given the shortcomings of the FTC's own enforcement tools prior to 1975, and given the uncertainty surrounding the FTC's rulemaking authority as late as 1970, it is unlikely that in 1965 Congress would have vested exclusive authority in the FTC to combat cigarette companies' false and deceptive advertising practices. And it is equally unlikely that the FTC would without explanation have divested States of authority to police such practices.

In 1975 Congress laid the controversy of the FTC's rulemaking authority to rest through the enactment of the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, Pub. L. No. 93-637, 88 Stat. 2183 (1975). With the passage of that Act, Congress also expanded the FTC's authority, in recognition of the inadequate tools at its disposal.

> The Act confirmed the FTC's ability to promulgate rules and regulations concerning unfair and deceptive practices. Additionally, the Act authorized the Commission to bring civil actions in federal court for certain violations of the rules, without any prior cease and desist orders. The Commission can also bring civil actions on behalf of injured consumers. The breadth of the FTC's powers was also enhanced by further additions to section 5: "unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce are hereby declared unlawful." With this increase in the jurisdiction of the FTC to include even those practices which merely affect com-

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[3] *1966 FTC Report*, *supra*, at 17.

> merce, Congress granted the Commission the broadest of powers to deal with deceptive practices.

Lewis, *supra*, 19 Fordham Urb. L.J. at 855-56.

Nevertheless, the Act "placed specific limitations on the use of the power to deal with unfair or deceptive practices" and imposed "'prolonged rulemaking procedures.'" *United Air Lines*, 766 F.2d at 1112 (quoting H.R. Rep. No. 793, 98th Cong., 2d Sess. 6 (1984)). The reason Congress "imposed upon the Commission rulemaking procedures and judicial review provisions stricter than those contained in the Administrative Procedure Act" was "[b]ecause of the potentially pervasive and deep effect of rules defining what constitutes unfair or deceptive acts," making "greater procedural safeguards ... necessary." *American Optometric Ass'n v. FTC*, 626 F.2d 896, 905 (D.C. Cir. 1980) (quoting H.R. Rep. No. 1107, 93d Cong., 2d Sess. 45-46 (1974)).

In light of Congress' grant of broad, formal rulemaking authority to the FTC ("with the possible consequence of pre-empting substantive state laws"[4]), coupled with Congress' concern that such authority be exercised carefully and subjected to stricter judicial oversight, the Court should be hesitant to infer preemptive effect from actions taken by the FTC.

Inferring preemptive intent from consent orders would be particularly inappropriate and could result in wholly unintended displacements of state law.

> Consent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms. The parties waive their right to litigate the issues involved

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[4] Stephanie W. Kanwit, 2 *Fed. Trade Comm'n* § 26:3 (2007).

> in the case and thus save themselves the time, expense, and inevitable risk of litigation. Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with the litigation. *Thus the decree itself cannot be said to have a purpose; rather the parties have purposes, generally opposed to each other, and the resultant decree embodies as much of those opposing purposes as the respective parties have the bargaining power and skill to achieve.* For these reasons, the scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it. Because the defendant has, by the decree, waived his right to litigate the issues raised, a right guaranteed to him by the Due Process Clause, the conditions upon which he has given that waiver must be respected, and the instrument must be construed as it is written, and not as it might have been written had the plaintiff established his factual claims and legal theories in litigation.

United States v. Armour & Co., 402 U.S. 673, 681-82 (1971) (emphasis added, footnote omitted). Thus, "since consent decrees and orders have many of the attributes of ordinary contracts, they should be construed basically as contracts, *without reference to the legislation the Government originally sought to enforce* but never proved applicable through litigation." *United States v. ITT Cont'l Baking Co.*, 420 U.S. 223, 236-37 (1975) (emphasis added).

The 1971 American Brands consent order on which Petitioners rely highlights the problem of attributing the specific "purpose" of authorizing the use of terms like "lowered tar" divorced from the FTC's specific charges of wrongdoing, which related to American Brands' comparative advertising. The consent order in that proceeding actually *prohibited* "use of the words 'low,' 'lower,' or 'reduced' or like qualifying terms, *unless the statement is accompanied by a clear and conspicuous disclosure of* ... [t]he 'tar' and nicotine content in milligrams in the smoke produced by the advertised cigarette," among other things. *In re American Brands, Inc.*, 79 F.T.C. 255, 258 (1971) (emphasis added). The order did not unqualifiedly "authorize" the use of such terms without regard to other facts—like those Respondents have alleged here—that would make use of those words deceptive or misleading.

Similarly, in *FTC v. Brown & Williamson Tobacco Corp.*, 778 F.2d 35 (D.C. Cir. 1985), the Commission instituted proceedings against Brown & Williamson (B&W) over the latter's advertisements of its Barclay cigarettes which had "an innovative filter design." *Id.* at 37. B&W advertised Barclays as 1 mg in tar, 0.2 nicotine by the FTC method. *Id.* The FTC found that due to the filter design "the FTC testing method does not accurately measure the tar and nicotine delivery of the Barclay." *Id.* at 38. The district court agreed and enjoined B&W "from representing in any advertising, including packaging and labeling, any specific milligram tar yield or content" unless the rating was measured in a way acceptable to the FTC. *Id.* at 39. The court of appeals affirmed with one caveat: to the extent the injunction prohibited B&W from devising a new testing system which would provide sufficient

information about competing brands "to allow consumers to make informed decisions," the court found the injunction to be overbroad.

> Because the FTC has not adopted its system of testing pursuant to a Trade Regulation Rule under section 18 of the FTC Act, one cannot say that the FTC system constitutes the only acceptable one available for measuring milligrams of tar per cigarette.

Id. at 44 (citation omitted). Such prior FTC approval "would enshrine the current FTC system as the sole legitimate testing method, *even though it was not passed pursuant to section 18 of the FTC Act*, 15 U.S.C. § 57a (1982), and subjected to the possibility of judicial review." *Id.* at 45 (emphasis added). Petitioners, in effect, seek the same improper result: giving the Barclay consent order or the FTC testing method the same preemptive effect of a trade regulation rule, even though they were not passed pursuant to the Commission's rulemaking authority.

Finally, the 1995 American Tobacco consent order settled the FTC's challenge to "an advertising campaign depicting 10 packs of Carlton cigarettes and single packs of other brands, with the relevant tar and nicotine ratings listed under each pack. The ads included statements such as, '30 packs of Carlton have less tar than 1 pack of these brands.'" *In re American Tobacco Co.*, 119 F.T.C. 3, 4 (1995). American Tobacco represented "that consumers will get less tar by smoking 10 packs of Carlton brand than by smoking a single pack of the other brands depicted in the ads." *Id.* The consent order required American Tobacco to cease and desist from making such claims, and paragraph III of the consent order merely provided that "presentation of the tar and/or

nicotine ratings ... shall not, in and of itself, be deemed to" constitute a Carlton-like numerical comparison which would violate Paragraphs I and II of the order. *Id.* at 11. That is by no stretch of the imagination a blanket, industry-wide approval of use of terms like "lights" and "lowered tar."

In addition, affording consent orders industry-wide legal effect would significantly undermine the functioning of the FTC's consent settlement process. The FTC has said that "a determination that consent orders are controlling precedents would severely limit the use of the consent settlement process." *In re Beatrice Foods Co.*, 86 F.T.C. 1, 50 (ALJ decision 1973, adopted as supplemented and modified by full Commission 1975); *see also* Stephanie W. Kanwit, 2 *Fed. Trade Comm'n* § 12.6 at 12-25 to 12-26 (2007). ("The courts and FTC have construed consent orders as contracts rather than as binding judicial precedent, reasoning that any other interpretation would hamper the consent settlement process.") (footnote omitted).

In the present matter, the FTC has never issued a trade regulation rule governing or defining terms like "lights" or "lowered tar." Indeed, in its most recent public comments on the issue, the FTC has said there are not even any "official definitions for these terms but they appear to be used by the industry to reflect ranges of FTC tar ratings." Cigarette Testing, Request for Public Comment, 62 Fed. Reg. 48,158, 48,163 (Sept. 12, 1997). Petitioners' claim that the Commission implicitly "authorized" the use of such undefined terms is unpersuasive and should be rejected.

CONCLUSION

The FTC's primary mission as a law enforcement agency is to *enforce* the FTC Act's Section 5 prohibition against unfair or deceptive conduct in commerce, rather than to give broad immunity to an industry from state police power. *See* 15 U.S.C. § 45(a)(2) ("The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations ... from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce."); *Fleming v. FTC*, 670 F.2d 311, 313 (D.C. Cir. 1982) (Commission's mandate is "to ferret out any unfair competition and unfair or deceptive trade acts or practices in or affecting commerce"). Nothing in the FTC's regulatory history suggests an intent to authorize, encourage, or immunize Petitioners' use of lights descriptors. The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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